



SAFETY VS. STUDENT

Know How to Respond to a Dangerous Student

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Tri-State Regional Special Education Law Conference
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OUR REALITY

- More than any other time in our recent educational history, school safety is on our minds.
- Some students are simply too ill, too violent, or too self-destructive to remain in school.
- These students are most likely to be students with disabilities entitled to the procedural protections of the IDEA.
- We need to explore the difficult and sometimes competing balance between school safety and student interests.


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OUR REALITY

- Video clip


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THE BALANCE


- High school students with disabilities are suspended at three times the rate of nondisabled peers according to *Out of School & Off Track: The Overuse of Suspensions in American Middle and High Schools*, (2013).
- This report noted that "the inflexible response to misbehavior in zero-tolerance or 'tough love' environments is more likely harming students' futures, undermining teacher-student and teacher-parent relationships, seriously reducing instructional time, and undermining overall school performance."

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THE BALANCE

- How do schools find the balance between putting students first and safety first?
- It can be elusive.
- Schools need clear, working knowledge of the IDEA, federal regulations, state statutes, and school policies.




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ADDRESSING DANGEROUSNESS

- There are typically 2 ways in which districts address dangerous students:
 1. Through the district's discipline provisions; AND/OR
 2. Through the IEP process based on the student's changing needs.


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USING DISCIPLINE PROVISIONS

- State statutes and school district discipline policies address student suspension and expulsion.
- Keep in mind that the statutes are promulgated for the general population.
- School districts **CANNOT** offer less protection to students than required by the IDEA and Federal Regulations.


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DISCIPLINE

- If evidence of dangerousness arises as a result of a disciplinary infraction, the school has the ability to utilize the district's discipline policy, to the extent consistent with the IDEA procedural safeguards, to remove the student from the educational environment.
- Regular education students can be suspended or expelled with minimal due process protections.
- Special education student discipline is complex. Use caution.

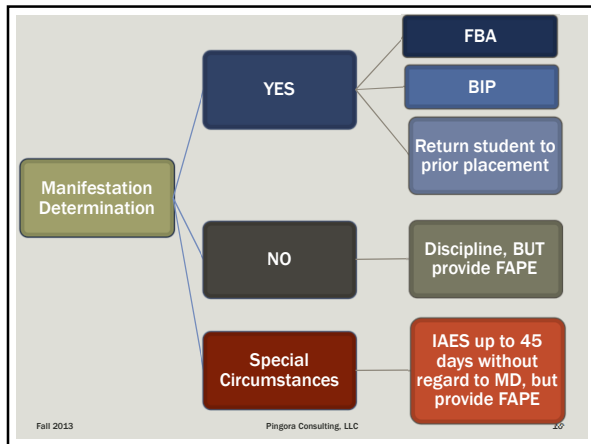
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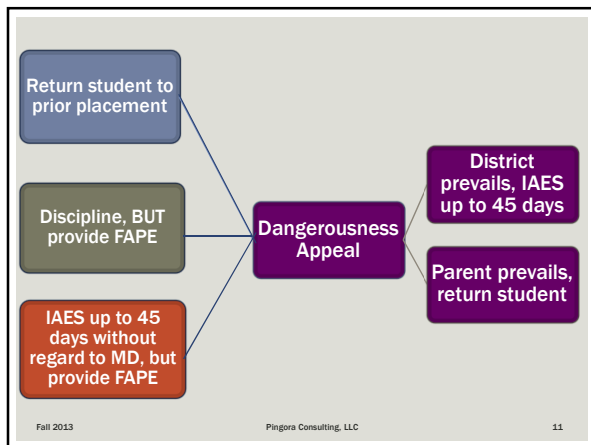


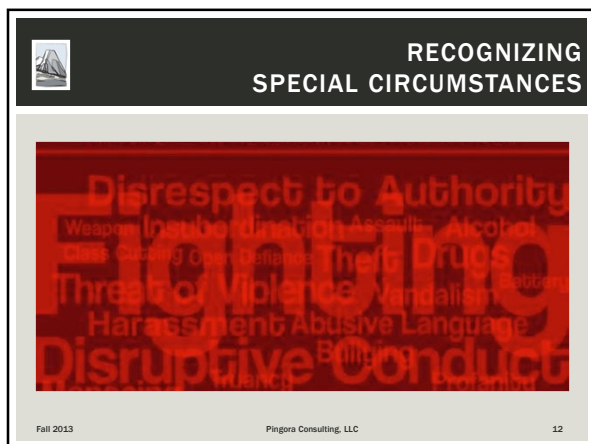
DANGEROUS SPECIAL ED STUDENTS


- Removals of greater than 10 consecutive days, or greater than 10 cumulative days if a pattern exists, will constitute a disciplinary change in placement.
- For any disciplinary removal that constitutes a change in placement, a manifestation determination must be conducted.
- The outcome of the manifestation determination dictates next steps, **UNLESS the district invokes the special circumstance provisions or proceeds to prove the student is dangerous to self or others.**

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SPECIAL CIRCUMSTANCES

34 C.F.R. §300.530(g)

- School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the child:
 - Carries a weapon to or posses a weapon at school. . .
 - Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school. . .
 - Has inflicted serious bodily injury upon another person while at school. . .

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DANGEROUS WEAPON

18 U.S.C. 930(G)(2)

The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

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WHAT ABOUT REPLICA WEAPONS?

- The Gun Free Schools Act (GFSA) applies to student's with disabilities, and must be construed in a manner consistent with the IDEA. 20 U.S.C. §4141(c) and OSEP Memorandum 95-16, 22 IDELR 531 (OSEP 1995).
- A toy gun, replica gun, or a BB gun meet the definition of a "dangerous weapon." See 18 U.S.C. §921(a)(3); *McLaughlin v. U.S.*, 476 U.S. 16, 17-18, 106 S.Ct. 1677, 1677-1678 (1986); and *U.S. v. Martinez-Jimenez*, 864 F.2d 664, 666 (9th Cir. 1988).

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CONTROLLED SUBSTANCES

18 U.S.C. 812(C)

There are five schedules of controlled substances, to be known as schedules I, II, III, IV, and V.




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ILLEGAL DRUG

Illegal drug means a controlled substance, but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority.

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SERIOUS BODILY INJURY

18 U.S.C. 1365(H)(3)

- “Serious bodily injury” means bodily injury that involves-
 - A substantial risk of death;
 - Extreme physical pain;
 - Protracted and obvious disfigurement; or
 - Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

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SERIOUS BODILY INJURY

18 U.S.C. 1365(H)(3)


■ Compare:

- *Westminster Sch. Dist.*, 56 IDELR 85 (SEA CA 2011) (Internal chest contusion resulting from head butt amounted to serious bodily injury).

VS.

- *In re: Student with a Disability*, 54 IDELR 139 (SEA KS 2010) (Short-term dizziness, blurred vision, and pain that paraprofessional suffered as a result of knuckle raps to the head did not justify student's 45-day removal).

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WHAT ABOUT ANY OTHER INJURY?

Nothing in the Act permits the Department to expand the definition of *serious bodily injury* to include a *bodily injury* beyond the cited definition.

71 Federal Register 46722.


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THE HEARING




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THE HEARING

- In order to request a hearing to prove dangerousness, the school district must file a due process hearing complaint.
- The school district must prove that maintaining the current placement of the student is **SUBSTANTIALLY LIKELY TO RESULT IN INJURY TO THE STUDENT OR OTHERS.**


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THE HEARING

- The hearing officer has the authority to order a change of placement to an IAES for not more than 45 school days **If it is determined that maintaining the current placement is substantially likely to result in injury to the student or others.**
- See 34 C.F.R. §300.532.


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EXPEDITED HEARING

Timeline Maxlums	Step In Hearing Process
20 days TOTAL	Expedited Hearing Completed
<ul style="list-style-type: none"> • 15 days • 7 days + 8 days 	Resolution Period (Parent request only) Hold Resolution Session Continue Resolution Attempts
10 days ADDITIONAL	Hearing Officer Decision

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THE MATH


**Up to 45 school days for special
circumstances**

+

**Up to 45 school days for
dangerousness**

Up to 90 school days


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LIMITED AUTHORITY

- **School personnel are not permitted to unilaterally place a dangerous student with a disability in an IAES.**
- Under the IDEA, only an impartial hearing officer may order it. Only a hearing officer may order a change of placement of a child with a disability to an appropriate IAES for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. 34 C.F.R. §300.532(b)(2).
- See *Light v. Parkway*, 21 IDELR 933 (8th Cir. 1994).

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**SUBSTANTIALLY LIKELY
TO RESULT IN INJURY**

- *Clinton County R-III Sch. Dist. v. C.J.K.*, 23 IDELR 306 (W.D. Mo. 1995) (The court refused to remove a 13-year-old student with a behavior disorder and learning disability who threatened mayhem, but had not, at that point, done anything more than throw and violently push furniture).

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SUBSTANTIALLY LIKELY TO RESULT IN INJURY

- *Alzheimer Sch. Dist.*, 108 LRP 17673 (SEA AR 2003) (The hearing officer found that student's behavior, which included a fight with another student and verbal threats against the school resource officer after being accosted, was "disruptive, verbally abusive, and insubordinate," but it did not justify removal to an alternative placement).

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SUBSTANTIALLY LIKELY TO RESULT IN INJURY

- *Scranton Sch. Dist.*, 29 IDELR 133 (SEA PA 1998) (The hearing officer found the behavior of 19-year-old who used threatening and foul language, "threw" furniture, punched at his teacher, and threw a box of Jell-O at his teacher was not substantially likely to result in injury; student had not injured anyone, and his behavior changed after his medication was modified).

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SUBSTANTIALLY LIKELY TO RESULT IN INJURY

- Verbal threats, without any physical injury, generally are not sufficient to create a substantial likelihood of future dangerous conduct.
- *Cabot Sch. Dist.*, 27 IDELR 304 (SEA AR 1997) (The student's alleged statement that he wanted assistant principal "six feet under" did not show he was substantially likely to cause serious bodily injury to himself or others).

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STAY-PUT IN IDEA DISCIPLINE

- 34 C.F.R. §300.533
- When a hearing is requested for disputes surrounding disciplinary removals, the manifestation determination, or dangerousness, the student **must remain in the interim alternative educational setting** (usually suspension) chosen by the IEP team pending the hearing officer's decision or until the time period for the disciplinary action expires, whichever comes first, unless the parent and public agency agree otherwise.
- 71 *Federal Register* 46726.


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OSEP'S OPINION

- Congress's clear intent was that when there is an appeal by a parent or a school, the child shall remain in the interim alternative educational setting chosen by the IEP team until the hearing officer issues a decision or the discipline time period expires.
- *Letter to Huefner, 47 IDELR 228 (OSEP 2007).*


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THROUGH THE IEP PROCESS



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WHAT ABOUT STUDENTS WHO NEED MORE?

- Some students become dangerous to themselves or others without being subject to the discipline provisions of the school district.
- These students are more likely to be significantly impaired.
- Often these students are acting out (or acting in) as part of the constellation of symptoms associated with a disability, without intent to harm or offend.

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STUDENTS WHO NEED MORE

- Schools are not free to stop serving these students, either by sending them home or denying readmission until the outcome of a threat assessment.
- Remember, special education includes “instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. 34 C.F.R. §300.39(a)(1).”

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ACTING IN

- **Take notice of depression or other emotional and mental illnesses that affect student learning. Dangerous to self is an important consideration.**
- In a Section 504 case, a student alleged that his frequent absences and comments about suicide put the district on notice that he suffered from depression. The district failed to evaluate his special education needs.
- “The court notes that Section 504 places a duty on the district to identify a child with a disability within a reasonable time after school officials are on notice of behavior indicating the child has a disability.” *D.G. v. Somerset Hills Sch. Dist.*, 50 IDELR 70 (D.N.J. 2008).

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ACTING IN

- **Students' needs change, and a district is always responsible for FAPE.**
- Be alert and aware if a student is NOT making progress.
- Lack of progress may be a warning to the district that mental health issues are adversely affecting FAPE.


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ACTING IN

- Some student's mental health issues may be segregable from educational needs. Other student's needs are intertwined. **Progress is the key.**
- Despite a student's severe emotional impairments and history of suicide attempts, she did not require a residential placement to receive FAPE, the 4th Circuit Court of Appeals held.
- The student's safety, mental health, and medical issues were distinct from her educational needs, and thus did not obligate the district to fund a residential placement. *Shaw v. Weast*, 53 IDELR 313 (4th Cir. 2010).


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NOTICE THE ACTING –IN STUDENT

- Adverse effect must be determined based on the student across environments, rather than just focusing on grades.
- Concluding that there was evidence that the middle school student's emotional disturbance may have taken a toll on his classroom performance, the court allowed his parents to proceed with charges that the district failed to properly evaluate him.


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NOTICE THE ACTING –IN STUDENT

- The district acknowledged that the student, who had a history of behavioral and discipline problems, and who was diagnosed with depression, engaged in inappropriate types of behavior or feelings under normal circumstances.
- However, it found the student ineligible because of his grades.
- The court agreed that there was a genuine dispute regarding whether the district violated the IDEA procedurally. It pointed out that the district's eligibility determination rested on its view that the student's emotional difficulties did not adversely impact his education because he was maintaining a C average.


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ADVERSE EFFECT & AVERAGE GRADES

- However, the student's ability was above average, the court observed.
- Thus, the district had at least some basis for believing the student's behavioral problems were negatively impacting his performance in class.
- *Moore v. Hamilton Southeastern Sch. Dist.*, 113 LRP 35214 (S.D. Ind. 2013).


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EDUCATIONAL NEEDS

- Evidence that a teenager with an emotional disturbance needed a 24-hour educational program helped her parents to recover the cost of her placement in a residential treatment center from a Colorado district.
- The District mistakenly believed that it had no FAPE responsibility for a student in psychiatric hospitalization.
- Concluding that the placement was appropriate, the U.S. District Court affirmed an administrative decision in the parents' favor.


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EDUCATIONAL NEEDS

- The District Court observed that the student's placement was appropriate under the various tests adopted by other Circuit Courts.
- Testimony that the student's mental health was intertwined with her educational success satisfied the "educationally necessary" test followed by the 3rd, 4th, 6th, and D.C. Circuit Courts of Appeal.


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EDUCATIONAL NEEDS

- Those statements also showed that the treatment of the student's psychiatric condition was "not quite apart" from her educational needs -- the test the 9th Circuit Court of Appeal follows.
- Furthermore, the District Court noted that the services provided in the residential program were "primarily oriented" toward allowing the student to receive an education as required by the 5th and 7th Circuit Courts of Appeal.


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EDUCATIONAL NEEDS

- "[The center] is an educational institution accredited by the State of Idaho, staffed by state-accredited teachers, in which [the student] is working towards her high school diploma."
- While the parents could not recover the cost of any services provided by a licensed physician, as they were not "related services" under the IDEA, the court held that they could recover the remaining costs of the student's placement.
- *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 57 IDELR 13 (D. Colo. 2011), *aff'd* 60 IDELR 91 (10th Cir. 2012).

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EDUCATIONAL NEEDS

- Using the plain language of the IDEA as a guide, the 10th Circuit held that the parents of a teenager with an emotional disturbance could recover the cost of their daughter's out-of-state residential placement from a Colorado district.
- The court affirmed a decision that the placement met the student's needs.
- *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 60 IDELR 91 (10th Cir. 2012).

This is a very important case in the 10th Circuit.


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EVALUATION NEEDS

- Keep in mind that if a school needs evaluative information in order to offer FAPE, the school must propose and obtain the evaluation without cost or obligation on the parent.
- Even if a child's parents have the ability to obtain an evaluation, the district still has a responsibility to evaluate the child in all areas of suspected disability.
- **BOTTOM LINE:** Districts cannot require parents to obtain an evaluation.
- See *N.B. v. Hellgate Elem. Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008).

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EVALUATION NEEDS

- The school district may need to propose
 - An outpatient evaluation,
 - An inpatient evaluation, or
 - A more restrictive placement.
- Alternatively, the school district may need to serve the student in a hospital or treatment setting if the parent admits the student for medical or chemical health reasons.

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A DANGEROUS STUDENT

- *Vincent v. Kenosha Unified Sch. Dist.*, 59 IDELR 242 (E.D. Wis. 2012).
- Although a Wisconsin district did not deny FAPE to a transfer student with a psychiatric disorder by developing an IEP that focused solely on reducing behavioral outbursts, it violated the IDEA by discontinuing the student's services based on teachers' safety concerns.

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A DANGEROUS STUDENT

- The District Court held that the student's exclusion from school resulted in a denial of FAPE.
- A district cannot opt out of providing special education services to a student with behavioral problems.
- If the student's behaviors are so severe that her service providers fear for their own safety, the district should reconvene her IEP team and discuss the need for a different placement.

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A DANGEROUS STUDENT

- The student here became physically aggressive toward her teacher and bit herself while receiving one-to-one instruction after hours on school grounds.
- While the district had the right to consider the need for a more restrictive setting, it could not simply stop providing services until the student was capable of behaving appropriately.
- The court criticized the district's view that it had no duty to educate the student until she was prepared for school.

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THE BOTTOM LINE

- If the school becomes concerned that a student's mental or emotional needs are adversely affecting education, or that the student may be a danger to self or others, REMEMBER THE 4 Rs:
 - ✓ **REVIEW**
 - ✓ **RECALIBRATE**
 - ✓ **RECONVENE**
 - ✓ **REVISE**


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THE BOTTOM LINE

- As a result of a student's acting out or acting in, the school may need to convene the IEP team to:
 - Plan a comprehensive evaluation to reassess the student's current needs;
 - Develop/revise a behavior intervention plan to address the urgent needs;
 - Propose a more restrictive setting if the student's education is adversely affected; and/or
 - Devise a plan to serve a hospitalized student.

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THE BOTTOM LINE

- Do not confuse a student's temporary hospitalization with a unilateral private placement.
- A unilateral private placement is evidenced by the "disenrollment from the public school system with the intent to place the child in a private school." *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 60 IDELR 91 (10th Cir. 2012).
- Schools must provide FAPE to students who are hospitalized.


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CRIMINAL BEHAVIOR




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DELINQUENCY BEHAVIOR

- Juvenile delinquency is not automatic grounds for residential placement. *Teague Indep. Sch. Dist. v. Todd L.*, 20 IDELR 259 (5th Cir. 1993).
- However, when the behavior underlying the criminal offense is so severe that it puts others or the student in danger, residential placement may be warranted. *Patterson C. v. Board of Educ. of Prince George's County*, 558 IDELR 384 (4th Cir. 1987).


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REFERRAL TO LAW ENFORCEMENT

- Nothing in the IDEA prohibits a school from reporting a crime committed by a child with a disability to law enforcement or judicial authorities.
- **HOWEVER**, providing information, copies of disciplinary records, or special education records is only permitted to the extent the disclosure is permitted by FERPA.
- See 34 C.F.R. §300.535.


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FERPA REQUIREMENTS

- FERPA states that parental consent is not required for the disclosure of records to school officials with legitimate educational interests in student education records.
- However, the school resource officer who received the incident report from the district was not such an official.


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FERPA REQUIREMENTS

- The ED noted that a district policy identified the types of officials with a legitimate interest in student records, and that school resource officers did not appear on that list.
- "Therefore, in order to disclose the student's education record to the [school resource officer], the [district] was required to have written parent consent from the [parent]," the ED wrote.
- See *Baltimore County Public Schs.*, 51 IDELR 201 (Maryland SEA 2008).


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FERPA REQUIREMENTS

- Consent is not required if:
 - (10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

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FERPA REQUIREMENTS

- **§ 99.36 (In relevant part.)**
- **What conditions apply to disclosure of information in health and safety emergencies?**
- (a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

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FERPA REQUIREMENTS

- (b) Nothing in this Act or this part shall prevent an educational agency or institution from—
 - (1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community.
- Accurate discipline records are important, even if the information is sensitive.


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- How to deal with a dangerous student through the IDEA discipline provisions.
- How to deal with a dangerous student through the IEP process based on student need.
- How to proceed with an abundance of caution.
- How to understand referrals to law enforcement.

WHAT WE COVERED



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THANK YOU

QUESTIONS?



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